



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CIVIL APPEAL NO. 7 OF 2009.**

**KHETIA DRAPPERS LTD. ::::::::::::::::::::::::::::::::::::::: APPELLANT.**

**VERSUS**

**PETER WAINAINA NJOROGE ::::::::::::::::::::::::::::::::::::::: RESPONDENT.**

**R U L I N G.**

The notice of motion dated 9<sup>th</sup> February, 2010 is brought under the provisions of sections 3 & 3A and 63 (e) of the Civil Procedure Act Order XLI Rule 4 and OL Rule 1 of the Civil Procedure Rules. The applicant is seeking for two principle orders; that this court do vary the conditions for stay of execution made by the lower court, by ordering the total decretal sum of Ksh. 2,223,444/= be deposited in a joint interest earning account in the names of both counsel on record instead of paying of Ksh. 500,000/= to the respondent as ordered by the lower court and the balance of Ksh. 1,732,444/= be deposited in an interest earning account in the names of counsel on record. The applicant also sought for an order that there be a stay of payment of Ksh. 500,000/= to the respondent pending the hearing and determination of this application.

This application is supported by the grounds stated on the body thereto and the matters deposed to in the supporting affidavit sworn by Muhan D. Khetia on 9<sup>th</sup> February, 2009. Briefly stated, judgment was entered in favour of the respondent in the tune of Ksh. 2,223,444.90 inclusive of costs. The applicant applied for stay of execution and by a ruling of Mrs. M.C. Chepseba – SPM dated 28<sup>th</sup> January, 2010 the applicant was granted conditional stay to deposit Ksh. 500,000/= within 14 days and to deposit the sum of Ksh. 1,723,444/= in a joint interest earning account in the names of counsel on record. The applicant contents that he is apprehensive that the respondent may not be able to refund the sum of Ksh. 500,000/= should be the appeal be successful. It is in the interest of justice that the order be varied so that the entire decretal sum is deposited in an interest earning account in the name of counsel.

This application was opposed by Mr. Ombati, learned counsel for the respondent relied on the replying affidavit by Peter Wainaina Njoroge sworn on 11<sup>th</sup> February, 2010. It was argued that the orders sought

to be reviewed was made by the lower court and it is the same court which has jurisdiction to review its own orders. Furthermore if the appeal succeeds the respondent has means to refund the decretal sum as he is a man of means. This application was faulted for failure to give reasons why the court should review an order made by another court the applicant has also not shown that they have an arguable appeal which has chances of success. Going by the ruling sought to be varied, it is evident that the appeal has no chances of success.

This application is made under the omnibus provisions that give inherent discretion to this court to make an order for ends of justice. It is also brought under provisions of Order 49 Rule 4 which deal with applications for stay of execution. Also looking at the prayers sought it appears as if the applicant is seeking for an order of review although the term used is variation of the conditions of stay imposed by the lower court. In my own understanding there is no difference between vary and review and if the applicant wanted to review the orders made by the lower court that application should have been made in that court. On the issue of stay of payment of Ksh. 500,000/= under the provisions of order 49 Rule 4 (2) of the Civil Procedure Rules the applicant is supposed to demonstrate that in addition to provide security he will suffer substantial loss if the appeal is successful and the respondent is ordered to refund that sum. The applicant has not demonstrated that they have an arguable appeal. This is a conditional stay. There were no special circumstances shown that the applicant will suffer substantial loss or that the respondent will not be able to refund the sum of Ksh. 500,000/=. For the above reasons, I find the application lacking merit. I have no difficulty to come to the conclusion that it should be dismissed with costs to the respondent.

Ruling read and signed on 16<sup>th</sup> December, 2010.

**MARTHA KOOME.**  
**JUDGE.**